Supreme Court, U.S.
FILED
SEP 2 2 2003
OFFICE OF THE CLERK

(2)

No. 03-278

In the Supreme Court of the United States

ePLUS GROUP, INC.

Petitioner,

v.

CARESOUTH HOME HEALTH SERVICES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

R. HAROLD MEEKS, JR., ESQ.
Counsel of Record
ERIC N. VAN DE WATER, ESQ.
PURSLEY LOWERY MEEKS LLP
SUNTRUST PLAZA, SUITE 4540
303 PEACHTREE STREET, N.E.
ATLANTA, GA 30308
(404) 880-7180
(404) 880-7199 fax

Counsel for Respondent
CareSouth Home Health Services, Inc.

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

9 pp

QUESTION PRESENTED

Whether an unpublished decision of the Fourth Circuit, affirming an unpublished opinion from the United States District Court for the Eastern District of Virginia, and containing a factual discussion but no legal analysis, creates such a compelling conflict with a decision of another United States court of appeal so as to warrant review by this Court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent respectfully submits this Corporate Disclosure Statement.

Respondent CareSouth Home Health Services, Inc. is a wholly owned subsidiary of CareSouth Health System, Inc.

TABLE OF CONTENTS

Question Presented i

Corporate Disclosure Statement ii

Table of Contents iii

Table of Authorities iv

Counter-Statement of the Case 1

Reasons for Denying the Writ 2

Conclusion 4

TABLE OF AUTHORITIES

Cases: **Page**

Hogan v. Carter, 85 F.3d 1113 (4th Cir. 1996) 2

Jefferson Fourteenth Ass. v. Wometco de Puerto Rico, 695 F.2d 524 (11th Cir. 1983) 3

Nagler v. Admiral Corp., 248 F.2d 319 (2nd Cir. 1957) 3

Ricketts v. Midwest Nat'l Bank, 874 F.2d 1177 (7th Cir. 1989) 3

Rules:

Rule 15.2 of the Rules of the Supreme Court of the United States 1

Rule 36(c) of the Fourth Circuit Court of Appeals 2

FED. R. CIV. P. Rule 54(c) 3

Other Authorities:

R. Stern, E. Gressman, S. Shapiro, K. Geller, Supreme Court Practice 225 (8th ed. 2002) 2

COUNTER-STATEMENT OF THE CASE

A review of the trial court's Memorandum Opinion reveals that the trial court was presented with a factually intensive dispute between the parties. However, the dispute was largely the consequence of an undisputed timeline of events, not the underlying facts themselves. The parties submitted the case on a written record for decision by the district court. The factual statement contained in the Petition for Writ of Certiorari of ePlus Group, Inc. (hereinafter "ePlus") contains an oversimplification of the history and nature of the relationship of the parties. The Memorandum Opinion of the district court sets forth a more comprehensive background.

In accordance with Rule 15.2 of the Rules of the Supreme Court of the United States, CareSouth notes herein certain misstatements contained in ePlus' Petition. First, Petitioner asserts the "basis of [the trial judge's] decision was that he recharacterized the leases as disguised security interests." Petition p. 3. Although this finding was admittedly one basis for the trial court's decision, the Memorandum Opinion also contains three alternate, independent bases under Virginia law supporting the ruling in favor of CareSouth. Second, ePlus suggests the trial court did not allow ePlus to present evidence on the issue of disguised security leases. Petition, p. 3. In fact, the parties agreed to submit the case to the district court judge for a decision on a stipulated record, including depositions and affidavits. ePlus waived its right to present further evidence through live testimony and apparently failed to present through stipulations or depositional testimony the facts that it, in hindsight, believes would have helped its case.

REASONS FOR DENYING THE WRIT

ePlus has failed to offer a compelling reason to grant the Petition for Writ of Certiorari. ePlus argues the Petition should be granted to resolve a conflict between the Fourth Circuit's decision and opinions of the Courts of Appeal for the Seventh and Eleventh Circuits. ePlus concedes it must demonstrate "a real or 'intolerable' conflict [between the decision sought to be reviewed and the decision of another court of appeals], not merely an inconsistency in dicta or in the generable principles criticized." Petition, p. 4, *quoting* R. Stern, E. Gressman, S. Shapiro, K. Geller, Supreme Court Practice 225 (8th ed. 2002). Yet, ePlus recognizes the Fourth Circuit's unpublished decision herein did not address the due process issue, even in *dicta*, that ePlus now maintains is in intolerable conflict with other circuit court decisions. [1] Petition, p. 5. Rather, that opinion contains a factual recitation with a two-line finding of no reversible error. Moreover, because both the Fourth Circuit's and the trial court's decisions were unpublished,[2] they hold no precedential value, Hogan v. Carter, 85 F.3d 1113, 1118 (4th Cir. 1996), and any citation thereto is disfavored by Fourth Circuit Court Rules. 4TH CIR. R. 36(c). It is apparent that ePlus is not concerned about reversing a "broad precedent" which is alleged to support the denial of due process, see Petition, p. 5, but rather it is merely interested in overturning an adverse judgment. There is simply no conflict, much less "intolerable conflict," among the circuit courts.

---

[1] The trial court's opinion does not address ePlus' due process argument either.

[2] Contrary to ePlus' suggestion, Petition, p.5, the trial court's decision does not appear in a Westlaw search of Fourth Circuit cases for "CareSouth" or "ePlus."

The circumstances underlying the decisions that are alleged by ePlus to be in conflict with the Fourth Circuit's opinion are easily distinguished from what occurred in this case. See Petition, p. 4. Ricketts v. Midwest Nat'l Bank, 874 F.2d 1177 (7th Cir. 1989) and Jefferson Fourteenth Ass. v. Wometco de Puerto Rico, 695 F.2d 524 (11th Cir. 1983) dealt with district courts' *sua sponte* dismissals of complaints with no advance notice or opportunity to be heard on the dismissals. In contrast, ePlus complains of no fair notice after the case was submitted to the trial court, sitting as factfinder, for a decision on the merits. Both parties waived their right to present live testimony at a trial in favor of a stipulated record. Each bore the risk the record would not be complete as presented when they knowingly and voluntarily agreed to this cost-saving measure. It is counsel's duty to alert the Court to controlling law, but where as here, counsel failed to apply law to facts in its arguments, the Court still has a duty to do so. See Nagler v. Admiral Corp., 248 F.2d 319, 328 (2nd Cir. 1957) ("For it is clear law that it is the duty of the court to grant the relief which the facts before it require; the legal theories which the parties may have suggested or relied on may be of help to the court, but do not control."); see also, FED. R. CIV. P. Rule 54(c) ("every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.") The circumstances presented here are vastly different than those underlying the circuit court opinions asserted to be in conflict.

ePlus' Petition should also be denied because it fails to address all the arguments supporting the trial court's ruling in favor of CareSouth. The trial court's ruling also offered three independent, alternate grounds for ruling in favor of CareSouth. ePlus does not seek review of these findings and, therefore, even if ePlus were to succeed in eventually

overturning the disguised lease portion of the trial court's decision, the ultimate result would remain the same.

CONCLUSION

For these reasons, the Petition should be denied.

This 22nd day of September, 2003.

RESPECTFULLY SUBMITTED,

PURSLEY LOWERY MEEKS LLP

BY: Roy Harold Meeks, Jr.
Counsel of Record
Eric N. Van De Water
Attorneys for CareSouth
Home Health Services, Inc.
SunTrust Plaza - Suite 4540
303 Peachtree Street, N.E.
Atlanta, Georgia 30308
(404) 880-7180
(404) 880-7199 - fax